



March 30, 2009

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Dear Ms. Johnson:

The Conference of State Bank Supervisors (CSBS) appreciates the opportunity to comment upon proposed amendments to Regulation E that would limit the ability of a financial institution to assess an overdraft fee for paying automated teller machine (ATM) withdrawals and one-time debit card transactions, unless the consumer has either opted in or out of an institution's overdraft service. CSBS is supportive of the purpose and goals of the proposed Regulation E, and strongly encourages the Federal Reserve Board (Board) to utilize the opt-in approach in its final rule.

CSBS applauds the Board for their timely consideration of overdraft programs and how they impact consumers. According to the Federal Deposit Insurance Corporation's *Study of Bank Overdraft Programs*, the use of automated overdraft programs is rapidly increasing. According to the report, 86 percent of banks operate at least one formal overdraft program, and most banks (69.4%) initiated their automated overdraft programs after 2001. In 2006, banks earned an estimated \$1.97 billion in nonsufficient fund-related fees, representing 74 percent of the \$2.66 billion in service charges on deposit accounts reported by banks in Call Reports. The study further documented that overdraft programs are having a significant impact upon lower-income customers. Micro-level data from 39 financial institutions indicated that accounts held by customers in low-income areas were more likely than accounts in higher-income areas to incur overdraft charges. Recurrent overdrafts were also more likely to occur the lower the income group.¹

As overdraft programs have become more prevalent in the banking industry, CSBS believes the Board's proposal will do much to protect consumers, while creating minimum burdens on financial institutions, and is therefore supportive of the proposed amendments to Regulation E. And while CSBS believes proposing both the opt-out and the opt-in approaches provides institutions with flexibility, we strongly prefer the opt-in approach.

The opt-in approach requires direct confirmation from the consumer that he or she wishes to participate in the institution's overdraft program. Based upon studies and data regarding consumer behavior, CSBS believes the opt-in approach more accurately captures the needs

¹ FDIC *Study of Bank Overdraft Programs*, November 2008, pages I-IV.

CONFERENCE OF STATE BANK SUPERVISORS

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of consumers. Separate research by Consumers Union and the Center for Responsible Lending shows that at least two-thirds of consumers would prefer to have a transaction denied rather than to pay an overdraft fee. CSBS believes that financial regulation should attempt to best approximate consumer preferences, especially those where the benefits to consumers outweigh the costs.

Further, CSBS supports the Board's approach to limit the scope of the proposed amendments to apply only to ATM withdrawals and one-time debit card transactions. Consumers are more likely to prefer overdraft protection to cover certain important transactions, such as a mortgage payment, which may have overdrawn a consumer's account. We support the Board's decision to treat those transactions differently from routine ATM cash withdrawals and debit purchases, where denial of a transaction is immediate and does not create a default on existing obligations.

CSBS also supports the Board's belief that disclosures about the right to opt out or in to an overdraft service provided in a deposit agreement are not timely and may be overlooked. Disclosures about the right to opt in or out of an overdraft service should be prominent and noticeable, perhaps as a separate document. Further, disclosures about the right to opt in or out should also be made available on any periodic statement reflecting an overdraft fee.

The Board recognizes that programming changes would be required by the proposed rules and may be costly for institutions to implement the new requirements of Regulation E. CSBS, however, believes the benefits to consumers outweigh reprogramming costs that must be borne by the industry. However, there should be a phase-in period for institutions to implement the requirements of Regulation E. We believe six to twelve months would be an appropriate implementation period for the proposed rule.

Under the proposal, institutions must provide consumers with a "reasonable opportunity" to either opt in or out of the institution's overdraft service. CSBS believes a 30 day period effectively constitutes a "reasonable opportunity" for consumers to opt in or out of overdraft programs. Also, CSBS commends the Board for encouraging institutions to provide multiple options for the consumer to opt in or out of the program. Institutions should allow consumers to choose between written, telephone, and secure electronic methods of opting in or out of overdraft services. Further, it is not necessary for the Board to provide examples of methods that would *not* satisfy the requirement to provide consumers with a reasonable opportunity to opt in or out.

The Board has also asked whether it should adopt an alternative approach that would expressly permit institutions to impose conditions upon the consumer's ability to opt in or out of an institution's overdraft service. Allowing institutions to impose conditions upon the consumer's ability to opt in or out leads us down a slippery slope and may be difficult to enforce. CSBS urges the Board to clearly state that institutions are not permitted to impose conditions upon consumers' ability to opt in or out of an overdraft service.

CSBS does, however, support the proposed exceptions to the opt-in and opt-out requirements. The exceptions should be consistent with written policies of the institution and should be presented to the consumer at account opening. Further, all exceptions should be posted on the institution's web site. And while CSBS supports the exception that would permit an institution to assess a fee if the institution has a "reasonable belief" that there are sufficient funds available at the time of the transaction, we encourage the Board to provide additional clarity on what is considered a "reasonable belief." Further, if a financial institution has real-time information available, this proposed exception should not be used inappropriately by banks to generate additional overdraft fee income. In other words, if an institution has access to timely information, this exception should not provide a safe harbor for abusive practices.

With regard to debit holds contributing to a consumer overdrawing their account, CSBS is supportive of the Board's proposal. Institutions should not assess a fee if the overdraft would not have occurred but for a debit hold placed on an account. CSBS supports the Board's proposal to limit the scope of the debit hold provision to those transactions in which the actual transaction amount can be determined within a short period of time after the institution authorizes the transaction, such as pay-at-the-pump fuel purchases.

Finally, CSBS urges the Board to encourage institutions to provide real-time disclosure for ATM transactions. CSBS believes technology is available to calculate a customer's balance and to alert the consumer if the transaction in progress will overdraw the account. A customer should be alerted to the fact that, if finalized, the transaction will overdraw their account and result in a fee. The consumer would then be granted the option to continue or cancel the transaction.

Again, thank you for the opportunity to comment upon the Board's proposed revisions to Regulation E.

Best regards,

A handwritten signature in black ink, appearing to read "Neil Milner". The signature is fluid and cursive, with the first name "Neil" and last name "Milner" clearly distinguishable.

Neil Milner
President & CEO